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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 560

RALPH H. TRAHER and VIRGINIA M. TRAHER, *Petitioners,*

v.

DE HAVILLAND AIRCRAFT OF CANADA, LTD., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP J. LESSER
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Washington, D. C.
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Date: November 20, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ralph H. Traher and Virginia M. Traher respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Reprinted as Appendices to this Petition, with the letter designations noted, are: (A) Ruling and Order of District Judge Holtzoff of the United States District Court for the District of Columbia; (B) Opinion of the United States Court of Appeals for the District of Columbia Circuit (reported at 294 F. 2d 229); (C) Judgment of the United States Court of Appeals for the District of Columbia Circuit: (D) Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing *en banc.*

JURISDICTION

The judgment of the Court of Appeals was entered in the above entitled action on June 29, 1961. A timely Petition for Rehearing *En Banc* was filed and was denied by the Court below by its Order entered on August 23, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an alien corporation, whose principal offices and activities are located in a foreign country, is amenable to the service of process and subject to the jurisdiction of the United States District Court in the District of Columbia, where such corporation maintains an office in the District of Columbia staffed by a salaried, full-time employee who regularly and continuously engages in soliciting orders for the sale of the corporation's products to the United States Government and who maintains close liaison and contact with the United States Government in Washington, D. C. to determine the Government's requirements for such corporation's products and to keep the corporation advised of problems encountered by the Government in the use of such corporation's products.

2. Whether any standard other than the "federal standard" as enunciated by this Court applies in the District of Columbia for determination of questions concerning jurisdiction over an alien corporation.

3. Whether a United States citizen is denied "due process of law" by the refusal of the Federal Courts to entertain jurisdiction over such corporation, where such citizen, an employee of the United States Government, was injured in the United States as a result of a defective product manufactured by such corporation and sold by it to the United States Government for use by such employee.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Title 13, section 103 of the District of Columbia Code, in pertinent part provides:

> "In actions against foreign corporations doing business in the District all process may be served on the . . . . person conducting its business, or, in case he is absent and can not be found, by leaving a copy at the principal place of business in the District, or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the Court.
>
> "When a foreign corporation shall transact business in the District without having any place of business or resident agent therein, service upon any . . . . employee of such corporation in the District shall be effectual as to suits growing out of contracts entered into or to be performed, in whole or in part, in the District of Columbia . . . ."

2. Title 29, section 933i of the District of Columbia Code, in pertinent part provides:

> "(b) If any foreign corporation shall transact business in the District without a certificate of authority, it shall, by transacting such business, be deemed to have thereby appointed the Commissioners [of the District of Columbia] its agent and representative upon whom any process, notice or demand may be served . . . . ."

3. Title 28, section 1332 of the United States Code, in pertinent part provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . . is between—
>
> • • • •
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; . . . . ."

4. Title 28, section 1391 of the United States Code, in pertinent part provides:

> "(c) A corporation may be sued in any judicial district in which it . . . . . is doing business . . . .
>
> (d) An alien may be sued in any district."

5. Amendment V of the Constitution of the United States, in pertinent part provides:

> "No person shall . . . . be deprived of . . . . property, without due process of law . . ."

6. Amendment XIV of the Constitution of the United States, in pertinent part provides:

> ". . . . nor shall any State deprive any person of . . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The appeal below was taken by petitioners from an Order of the District Court for the District of Columbia granting respondent's Motion to Quash Service of Process against respondent based upon the Court's ruling that respondent was not doing business in the District of Columbia and therefore not amenable to service of process in the District. The Court of Appeals affirmed the decision of the District Court.

The facts in the case upon which the District Court based its ruling were set forth in affidavits submitted by the parties and which are reprinted herein as Appendix E for the convenience of this Court. Those facts are substantially as follows:

Petitioner, Ralph Traher, was an officer of the Immigration and Naturalization Service of the United States Department of Justice attached to the Washington, D. C. Office of that agency and a resident of the Washington,

D. C. Metropolitan area. On June 5, 1957 while he was on a border patrol mission in the State of Montana, the Government-owned aircraft in which he was a passenger nose-dived and crashed in an attempted landing and he sustained very serious and permanently disabling injuries.

Investigation by the United States Government showed the cause of the crash to be a defective hydraulic component of the aircraft which had been manufactured and sold by the respondent to the United States Government, petitioner's employer. The investigation was conducted by employees of the Civil Aeronautics Administration, U. S. Department of Commerce working out of the headquarters office in Washington, D. C. and those who are personally familiar with the cause of the crash reside in the Washington, D. C. Metropolitan area.

After emergency medical treatment was administered to Traher he was returned to his home in the Washington, D. C. Metropolitan area. Further medical treatment, hospitalization, and surgery were provided to him in Washington, D. C.

Petitioners filed the within action in the United States District Court for the District of Columbia against respondent based on negligence in design, manufacture, assembly, inspection and testing of the aircraft and breach of implied warranty in the sale of such aircraft by the respondent to petitioner's employer, the United States Department of Justice.

Shortly prior to the commencement of the within action the petitioners had moved to and become residents of the State of Minnesota.

Respondent is an alien corporation, incorporated under the Laws of the Province of Ontario, Canada. Its main plant and offices are located in Ontario, Canada.

Respondent maintains an office, staffed by a full-time salaried employee in the Tower Building, 1401 K Street,

N. W., Washington, D. C. with a telephone listing in the Washington, D. C. alphabetic telephone directory in respondent's name at that address. Respondent is also listed at that address in the Washington, D. C. classified directory ("Yellow Pages") under the title "Aircraft Manufacturers".

Respondent's full-time employee in the District of Columbia acts for respondent "in the capacity of Washington representative".[1] His function as "Washington representative" of the respondent is "to provide liaison between it and the various armed services and other agencies of the United States government". His duties are "to keep contact with and to gather and transmit information relevant to government requirements for [respondent's] products and to establish necessary contacts between the corporate officials and government agencies". He does "not solicit business from anyone in the District of Columbia other than government agencies". He has "no authority to accept orders for [respondent's] products, but all such purchase orders would be forwarded for processing in Canada and ultimate consideration and acceptance at the corporate office in Toronto, Canada". He answers inquiries from non-governmental sources and if a sale or service is the subject of such inquiry he refers the caller to the respondent's sales and service agency outside of the District of Columbia. The office in the Tower Building is provided to him by respondent for his "convenience in performing [his] assigned duties in contacting various government agencies".

"The United States Department of Defense is, and has for some years, been an important user of [respondent's] products". In November, 1954 "in view of the importance of keeping close liaison with the United States forces,

---

[1] This quotation and all succeeding quotations in this section are taken verbatim from respondent's affidavits set forth in Appendix E.

[respondent] decided to have an employee in Washington to act as liaison with the U. S. Department of Defense, and with other Departments of the United States Government. An existing employee . . . was therefore sent to Washington. He took up residence within the District of Columbia." In November, 1957 "arrangements were made by [respondent] with the Aero Insurance Agency in Washington to provide its Washington representative with part-time secretarial service, telephone answering service and office space. This arrangement with the Aero Insurance Agency still continues".

"The duties of this representative or liaison officer in Washington have always been to maintain a close liaison with the U. S. Forces and in this way to obtain and forward to [respondent's] Head Office all information with regard to U. S. military requirements that might be of interest to [respondent] and advise [respondent] of any problems experienced in the operation of its aircraft in service with the U. S. Army". Such representative is also required "to keep contact with Civil Departments of the U. S. Government who might be interested in [respondent's] products and to keep Head Office informed of their requirements".

"Contracts for the supply of [respondent's] products to civilian departments of the U. S. Government may be made with a broker in the United States who then resells to the Government Department concerned, or the contract may be made by the Government Department direct with [respondent]. In either case, the contract is entered into and signed by [respondent] at its Head Office." (It takes at least two parties to make a contract—and it is entirely proper to assume that many of such contracts are signed by the United States Government in Washington, D. C.)

During the years 1954 through 1959 the United States Department of Defense has purchased 69.7 millions of

dollars of respondent's products, presumably as a result in large measure of the liaison and solicitation activities of respondent's full-time employee in Washington, D. C.

REASONS FOR GRANTING THE WRIT

This case is of importance far beyond the particular facts and parties involved. It involves issues applicable to all cases concerning jurisdiction over foreign corporations in the District of Columbia. It involves an issue in which the Court of Appeals for the District of Columbia has refused or failed to follow applicable rulings of this Court on this subject. It involves an issue in which there is substantial conflict on this question between the ruling of the Court of Appeals for the District of Columbia and applicable rulings in other Circuits. Further, it involves a fundamental constitutional issue concerning a citizen's right of access to the Federal Courts to litigate in the United States his claim against an alien corporation where such claim arose in the United States.

I

The decision below is in direct conflict with applicable decisions of this Court which hold that a foreign corporation is subject to the jurisdiction of the forum where it maintains "certain minimum contacts" within the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". *International Shoe Company* v. *Washington*, 326 U.S. 310; *McGee* v. *International Life Insurance Company*, 355 U.S. 220; *Hanson* v. *Denckla*, 357 U.S. 235.

But the Court of Appeals for the District of Columbia did not apply this test in the instant case. Relying upon its ruling of more than fifteen years ago in *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142 (1945), the lower court held in the instant case that "In *Mueller Brass* the governmental contacts of the

defendant were held insufficient to provide a basis for service in a suit brought by a plaintiff not involved in those contacts. The same is true in the instant case, which is strikingly similar in its facts".

In the instant case the court below justified this ruling and its reliance on its earlier ruling in *Mueller Brass* by finding that the respondent's employee "does not solicit orders from anyone in the District other than the Government" and that the "present suit has no connection with the District of Columbia or [respondent's] activities here, such as they are." (Appendix B).

There is no reasonable basis to distinguish between the solicitation of orders from the United States Government and the solicitation of orders from private individuals. Indeed, the United States Government is probably the largest single customer of private industry in the District of Columbia and accounts for more economic activity in the District in the form of purchases of goods and services than any other customer. A corporation which regularly and continuously solicits business in the District of Columbia from the United States Government on a full-time basis through the medium of a full-time employee is certainly engaged in at least "minimum contacts" with the District such that the maintenance of a suit against it in the District would not offend "traditional notions of fair play and substantial justice".

Title 13, section 103 of the District of Columbia Code authorizes service of process on foreign corporations which are "doing business" or which "transact business" in the District of Columbia.

Title 29, section 933i(b) of the District of Columbia Code, recently enacted in 1959 (73 Stat. 242, effective July 23, 1959), provides for service of process on foreign corporations which "transact business" in the District of Columbia.

The above statutory provisions do not create standards which are any different from those applied in a number of other Circuits. Yet the decisions of the Court below in the instant case and in the *Mueller Brass* case on which it relied are in substantial conflict with the weight of the rulings in other Circuits.

Measured by the "federal standard" of "doing business" (28 U.S. Code 1391(c)) or by local standards as discussed by Circuit Judge Clark in *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508 (1960), the Second Circuit now holds that a foreign corporation's solicitation of business which is substantial and continuous is sufficient to confer jurisdiction over such corporation.

Similarly it is now held in the Third Circuit that continuous activities which were conducted by a representative of a foreign corporation "to encourage the use and stimulate the sales" of a corporation's products rendered such corporation subject to the jurisdiction of the forum. *Florio* v. *Powder Power Tool Corporation*, 248 F. 2d 367 (1957).

In the Fourth Circuit it has been held that the jurisdictional requirements were satisfied by the activities of an agent of a foreign corporation whose primary duty was the solicitation of business and that if any further requirement existed it arose as a result of the application of state law rather than federal standards. *Westcott-Alexander, Inc.* v. *Dailey*, 264 F. 2d 853 (1959).

The only appropriate standard in the District of Columbia is the so called "federal standard" unless by special statutory enactment, Congress were to have provided another. It is clear from the provisions of the District of Columbia Code referred to above and quoted at length in an earlier section of this brief that Congress has not provided any jurisdictional standard for the District of Columbia which differs from the so called "federal stand-

ard" involving the general concepts of fair play as enunciated by this Court in the *International Shoe*, *McGee* and *Hanson* cases, *supra*.

The "federal standard" and the criterion of fair play if applied in this case could not have resulted in the rejection of jurisdiction over this respondent. The highly restrictive standard used by the Court below creates a most paradoxical and unjust situation. On the one hand the decision recognizes that an alien corporation enjoys substantial economic and business activities within the District of Columbia, a substantial volume of business with the United States Government and the benefits and protection of the laws of the United States and of the District of Columbia, while on the other hand the decision holds that such alien corporation is immune from service of process when it is sought to be held accountable for the sale of a defective and dangerous product which was manufactured by it for sale to the United States Government.

This Court should resolve the question of the jurisdictional standard to be applied in the District of Columbia and, in so doing, settle and resolve the conflict between the standard applied by the Court below and the federal standard applied in other Circuits.

II

This case presents an important constitutional question for resolution by this Court, viz: may the Courts of the District of Columbia in effect deny a citizen the right to bring an action in the District of Columbia when the effect of such denial is to deprive the citizen of the only forum available to him in the United States to litigate his claim.

In this case the District Judge ruled: "The Court realizes that some inconvenience results to the plaintiff in that apparently his only remedy is by suing in the Province of Ontario, Canada". (Appendix A)

In effect, the Court below relegated the petitioner to a foreign country to sue for his injuries which occurred here and which were caused by a defective product sold by respondent to petitioner's employer, the United States Government.

The action of the District Judge and of the Court of Appeals in affirming that decision results in a denial of due process of law to petitioner. None of the witnesses as to respondent's liability and petitioner's damages are subject to compulsory process by the Canadian Courts, and thus petitioner is deprived of an effective forum where his claim can be properly litigated.

Petitioner has been denied the right to a trial in accordance with recognized federal procedures which are available to other citizens. He has been denied the opportunity to present his claim which is a vital part of due process.

It is well recognized that a cause of action for damages is a property right which cannot be taken away or destroyed without due process of law. The guarantees in the Fifth and Fourteenth Amendments protect petitioner's cause of action for his injuries and those guarantees require that an appropriate and adequate remedy be afforded to petitioner *by the Courts in this country* for the vindication of his rights.

"Due process of law" is a guarantee of appropriate legal proceedings in this country, not of legal proceedings in a foreign country.

CONCLUSION

It is offensive and repugnant to all "traditional notions of fair play and substantial justice" to deny petitioner a forum in the District of Columbia and to relegate him to a foreign country for the vindication of his right of action against respondent, while at the same time to permit the respondent to enjoy substantial, continuous and lucrative

business activities in the District of Columbia resulting in the sale of large quantities of its products to petitioner's employer, the United States Government for petitioner's use, and particularly where the cause of action sought to be asserted by petitioner involves one of those products sold by the respondent to petitioner's employer.

The writ should be granted.

Respectfully submitted,

PHILIP J. LESSER
I. IRWIN BOLOTIN
917-15th Street, N. W.
Washington, D. C.
Attorneys for Petitioners

Date: November 20, 1961

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[September 21, 1960]

Ruling

THE COURT (J. Holtzoff): The Court is of the opinion that the matters referred to in the interrogatories have all been covered by the affidavits submitted in connection with this motion.

Moreover there was no request for a continuance of the motion for a hearing on the motion until after counsel for the moving party had completed his argument and opposing counsel had partially completed his argument. While it is irregular, of course, for counsel to request a continuance after the argument is partially completed, such an application should have been made at the opening of the argument.

The Court might say this, however, that it would overlook this course which the Court does not commend, if the ends of justice required it because after all the purpose of the Court is to do justice to the parties. But, it seems to the Court that the material sought by the interrogatories is already covered in affidavits. The Court is constrained to grant the motion to quash service of process upon the defendant on the ground that the defendant is not doing business in the District of Columbia, within the meaning of the governing statute as it has been construed by the Court of Appeals in this circuit.

It appears that the defendant maintains an office in the District of Columbia with one employee, although the number of employees is not governing, and that it has a listing in the telephone book. The activities of the office, however, are confined to solicitation of business and to answering inquiries as well as gathering information. No contracts or deliveries are made in the District of Columbia.

The Court of Appeals has held on many occasions that solicitation of business in the District of Columbia and maintaining an office for that purpose and for the purpose of answering inquiries or trying to adjust complaints, are not sufficient activities to constitute the doing of business in the District of Columbia to justify the service of process here on a foreign corporation.

The Court realizes that some inconvenience results to the plaintiff in that apparently his only remedy is by suing in the Province of Ontario, Canada. However, this is not as though he was remitted to suit in a distant country, or in a country that has a different system of law than that prevailing in The United States of America. After all, there are many places in the United States that are more distant than Ontario, but in any event the Court has no alternative but to grant the motion to quash service.

[Filed October 3, 1960]

Order

This cause came on to be heard upon consideration of the Motion of defendant, The De Havilland Aircraft of Canada Ltd., To Dismiss or, in the alternative, To Quash the return of service of summons upon the ground that the defendant is not subject to service of process within the District of Columbia, and upon consideration of the same, the affidavits herein, and arguments of counsel, it is by the Court, this 3rd day of October, 1960,

ORDERED, that the Motion to Quash the return of service of process be, and hereby is, granted.

/s/ ALEXANDER HOLTZOFF
Judge

[Certificate of Service]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,098

RALPH H. TRAHER, ET AL., APPELLANTS,

v.

DEHAVILLAND AIRCRAFT OF CANADA, LTD., APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided June 29, 1961

Mr. I. Irwin Bolotin, with whom *Mr. Philip J. Lesser* was on the brief, for appellants.

Mr. Frank F. Roberson, with whom *Mr. David N. Webster* was on the brief, for appellee.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

PER CURIAM: Appellants, residents of Minnesota, filed a complaint in the United States District Court for the District of Columbia seeking to recover for injuries sustained in an airplane crash in Montana, allegedly caused by the negligence of appellee, a Canadian corporation. Service of process was sought to be made by serving the appellees' sole employee in the District of Columbia. Appellee moved to quash service of process upon it on the ground that it was not "doing business in the District" within the meaning of D. C. CODE § 13-103. Appellee's motion was granted, and this appeal followed.

Appellees' affidavits disclose that appellee is a designer, manufacturer, and overhauler of aircraft with main plant and offices in Canada; that it maintains a single employee in the District of Columbia, who serves as a liaison or contact man with the United States Government and particularly with the armed forces; that this employee's principal duties are to transmit to appellee information about the United States Government's requirements and to keep in contact with Government agencies; that he does not solicit orders from anyone in the District other than the Government; and that he is without authority to accept orders from any source, governmental or otherwise, or to execute contracts on behalf of appellee. All contracts are entered into at appellee's offices in Canada, and deliveries of aircraft are made in that country. The present suit has no connection with the District of Columbia or appellee's activities here, such as they are. We conclude that under these circumstances the attempted service of process was properly quashed. See *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142 (1945); cf. *Frene* v. *Louisville Cement Co.*, 77 U.S. App. D.C. 129, 134 F. 2d 511 (1943).

Our recent decision in *Fiat Motor Co.* v. *Alabama Imported Cars*, —— U.S. App. D.C. ——, —— F. 2d —— (1961), is not to the contrary. That was a suit instituted under the Automobile Dealers Franchise Act, 15 U.S.C. §§ 1221-1225 (1958), affecting business relationships and transactions between private parties within the District of Columbia. In *Mueller Brass* the governmental contacts of the defendant were held insufficient to provide a basis for service in a suit brought by a plaintiff not involved in those contacts. The same is true in the instant case, which is strikingly similar in its facts.

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 16,098

Civil 1659-60

RALPH H. TRAHER, *et al.*, *Appellants*,

v.

DEHAVILLAND AIRCRAFT OF CANADA, LTD., *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Before: Prettyman, Washington and and Danaher, *Circuit Judges*.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appelle herein recover from appellants its taxable costs on this appeal, and have execution therefor.

PER CURIAM.

Dated: Jun 29 1961

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 16,098

RALPH H. TRAHER, *et al.*, *Appellants*,

v.

DEHAVILLAND AIRCRAFT OF CANADA, LTD., *Appellee*.

Before: Wilbur K. Miller, *Chief Judge*, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, *Circuit Judges, in Chambers*.

Order

Upon consideration of appellants' petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

PER CURIAM.

Dated: Aug 23 1961

APPENDIX E

[Filed July 21, 1960]

Affidavit

DISTRICT OF COLUMBIA, ss:

Joseph E. McDonald, Jr., residing at 305 Capital View Court, McLean, Virginia, being duly sworn deposes and says:

(1) I am employed by De Havilland Aircraft of Canada, Ltd. (hereinafter referred to as "De Havilland") in the capacity of Washington representative to maintain liaison between it and agencies of the United States government.

(2) This affidavit is made in support of De Havilland's motion to dismiss the above-captioned action.

(3) I am the only employee of De Havilland in Washington, D. C. I am provided, through arrangement with Aero Insurance Agency, with part-time secretarial service, telephone answering service, a desk and a chair in its office located in the Tower Building of Washington, D. C.

(4) My sole function as Washington representative of De Havilland is to provide liaison between it and the various armed services and other agencies of the United States government. My duties are to keep contact with and to gather and transmit information relative to government requirements for De Havilland products and to establish necessary contacts between the corporate officials and government agencies. I do not have any power or authority of ultimate decision on problems arising from the sale of corporate products.

(5) I have no authority to make, and never have made, any commitments as an agent of De Havilland.

(6) To the occasional non-governmental injuiry made to me relative to De Havilland products, I reply courteously, furnish the requested brochure if available, or, if a sale

or service is the subject, refer the caller to De Havilland's sales and service agency which is not in the District of Columbia.

(7) The limited office facilities are provided for me in the District of Columbia for my convenience in performing my assigned duties in contacting various government agencies. I do not solicit business from anyone in the District other than government agencies. I have no authority to accept orders for De Havilland's products, but all such purchase orders would be forwarded for processing in Canada and ultimate consideration and acceptance at the corporate office in Toronto, Canada. No contracts are executed in the District of Columbia nor are its products stocked therein by it.

/s/ JOSEPH E. MCDONALD, JR.

[Jurat dated July 5, 1960]

[Filed July 21, 1960]

Affidavit

DISTRICT OF COLUMBIA, SS:

George Joseph Mickleborough, residing at 41 Thornbank Rd., Thornhill, in the Township of Vaughan in the County of York, in the Province of Ontario, Canada, being duly sworn, deposes and says:

(1) I am Secretary-Treasurer and a Director of The De Havilland Aircraft of Canada Ltd., sued as De Havilland Aircraft of Canada Ltd. (hereinafter referred to as "De Havilland"), the defendant in this action.

(2) This Affidavit is made in support of the motion by De Havilland to dismiss the above captioned action.

(3) The defendant is a public company, incorporated under the laws of the Province of Ontario, having its Head Office at Downsview, in the Township of North York, Ontario.

(4) All the Company books and records of De Havilland, with the exception of the share registers, are kept at the Head Office of De Havilland. The share registers are kept with the National Trust Company Limited at 20 King Street East, in the City of Toronto, in the Province of Ontario. The National Trust Company is the share transfer agent for De Havilland.

(5) All meetings of the Directors and of the shareholders of De Havilland are held at the Head Office.

(6) No Company books nor share registers of De Havilland have at any time been kept within the District of Columbia, nor have any meetings of Directors or shareholders ever been held in the said District.

(7) De Havilland carries on business as designer, manufacturer and overhauler of aircraft. The main plant and offices are situate at Downsview, Ontario, and it has Spare Parts Depots in Vancouver and Edmonton, both within the Dominion of Canada. De Havilland has not now, or has it ever had, any manufacturing or assembly plant or repair depot or spare parts depot or sales office within the District of Columbia.

(8) De Havilland is not now, or has it ever been, licensed to do business within the District of Columbia.

(9) De Havilland does not now pay, nor has it ever paid, any taxes in the District of Columbia.

(10) The United States Department of Defense is, and has for some years, been an important user of De Havilland's products as the following table will show:

	Sales Millions of Dollars Canadian Commercial Corporation for U.S. Department of Defense
Year Ended September 30, 1954	6.0
1955	8.4
1956	14.0
1957	12.5
1958	13.3
1959	15.5
	69.7

(11) In or about the month of November, 1954, in view of the importance of keeping close liaison with the United States forces, De Havilland decided to have an employee in Washington to act as liaison with the U.S. Department of Defense, and with other Departments of the United States Government. An existing employee, one D. J. Givens, was therefore sent to Washington. He took up residence within the District of Columbia. He carried out his duties from his home, which was a private apartment situate within the District of Columbia until November, 1957, when arrangements were made by DeHavilland with the Aero Insurance Agency in Washington to provide its Washington representative with part-time secretarial service, telephone answering service and office space. This arrangement with the Aero Insurance Agency still continues.

(12) In or about the month of May, 1958, De Havilland decided that its representative should be an United States citizen and accordingly, Mr. Joseph E. McDonald, Jr., a former Lieutenant Colonel in the United States Army was employed in place of Mr. Givens who returned to Head Office. Mr. McDonald had previously acted in a similar

capacity as liaison officer with the United States military authorities for the Beech Aircraft Company.

(13) The duties of this representative or liaison officer in Washington have always been to maintain a close liaison with the U.S. Forces and in this way to obtain and forward to De Havilland's Head Office all information with regard to U.S. military requirements that might be of interest to De Havilland and advise De Havilland of any problems experienced in the operation of its aircraft in service with the U.S. Army.

Secondary functions of the representative are:

(i) to keep contact with Civil Departments of the U.S. Government who might be interested in De Havilland's products and to keep Head Office informed of their requirements, and

(ii) to deal with any other inquiry which might be received. Such inquiries are infrequent. Should they relate to a matter of sales or servicing of De Havilland's products, the inquirer is referred to the Head Office. If they are for general information, for example from school children, then the liaison officer is expected to reply suitably.

(14) The representative has no authority to make any commitment, nor does he have any power to make any decision on any matters relating to the sale of De Havilland's products. All inquiries relating to sales are passed to Head Office.

(15) All contracts for sale of De Havilland's products are entered into at the Head Office and are signed there by officers of De Havilland.

(16) All contracts for the supply of De Havilland's products for use by the U.S. Department of Defense are made by De Havilland with the Canadian Commercial Corporation which, in turn, contracts with the U.S. Depart

ment of Defense. The Canadian Commercial Corporation is an agency of the Canadian Government and has its own separate legal entity. Delivery under these contracts has always been at Downsview, Ontario.

(17) Contracts for the supply of De Havilland's products to civilian departments of the U.S. Government may be made with a broker in the United States who then resells to the Government Department concerned, or the contract may be made by the Government Department direct with De Havilland. In either case, the contract is entered into and signed by De Havilland at its Head Office.

(18) To the best of my knowledge, information and belief, no aircraft or spares have ever been delivered to any Department of the U.S. Government either military or civil or to any other purchaser in the District of Columbia.

(19) The name of De Havilland appears in the Washington Telephone Directory. To the best of my knowledge, information and belief, the name of De Havilland does not appear in any Washington street directory nor in any Washington trade directory.

(20) To the best of my knowledge, information and belief, no reference to De Havilland's Washington Representative or Washington Office appears in any trade or similar directory.

/s GEORGE J. MICKLEBOROUGH

[Jurat dated July 18, 1960]

[Filed September 19, 1960]

Affidavit in Opposition to Motion to Dismiss Action

DISTRICT OF COLUMBIA, ss:

Philip J. Lesser, being first duly sworn according to law upon oath deposes and says:

1. I am one of the attorneys for the plaintiffs in this case and have actively participated in the investigation concerning the facts and circumstances of the present cause of action.

2. At the time of his injury on June 5, 1957, the plaintiff Ralph Traher resided at 6531-28th Street, N. Arlington, Virginia and was employed as an Assistant Security Officer by the Immigration and Naturalization Service, United States Department of Justice, with the headquarters of his employment at Washington, D. C. The plaintiffs are presently residing temporarily at Minneapolis, Minnesota.

3. The injury which occurred to the plaintiff Ralph Traher was the result of defective mechanism in an airplane which was manufactured by the defendant and sold to the Immigration and Naturalization Service, an agency of the United States Government. The accident occurred in the State of Montana while the plaintiff Ralph Traher was on a border patrol mission acting within the scope of his employment by the United States Government.

4. The plaintiff Ralph Traher is entitled to receive and has received workmen's compensation benefits from the United States because of his injury, under the provisions of the Federal Employees' Compensation Act (5 U.S. Code 751, et seq.) That Act provides that an employee shall prosecute an action for damage if the injury is caused under circumstances creating a legal liability upon some person other than the United States, or the employee may be required by the Bureau of Employees' Compensation to assign his right of action to the Untied States. The Act also provides that an employee is required to remit to

the Bureau of Employees' Compensation the full amount of the compensation which has been paid to him on account of the injury from any recovery received against such third party. The United States accordingly is a party in interest to the present proceedings.

5. I am advised and therefore state upon information and belief that the defendant does not maintain an office and cannot be served with process either in the State of Montana where the accident occurred, or in the State of Minnesota where the plaintiffs are residing temporarily. The District of Columbia is the most convenient forum for the trial of this case since all official records of the investigation made by the Civil Aeronautics Administration, United States Department of Commerce, which reveal the cause of the accident, are either located in the District of Columbia or can be obtained through service of process upon the appropriate government officials in the District of Columbia; that the investigator for the Civil Aeronautics Administration, who is personally familiar with the cause of this accident resides in the Washington, D. C. metropolitan area and is amenable to process of this court; two of the three medical witnesses maintain their offices in this jurisdiction and are not amenable to process in any other jurisdiction. The principal medical witness who was assigned the medical supervision of the case by the Bureau of Employees' Compensation is Dr. R. E. Moran who maintains his office at 1532-16th Street, N. W., Washington, D. C. Another medical witness is Dr. Allen E. Walker who maintains his office at 915-19th Street, N. W., Washington, D. C. A third medical witness is Dr. Edward N. Hamacher of Spokane, Washington. The only available witness concerning the plaintiff's employment, loss of time and loss of earnings is from the office of the Immigration and Naturalization Service in Washington, D. C.

/s/ Philip J. Lesser

[Certificate of Service]

[Jurat dated September 19, 1960]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 560

RALPH H. TRAHER and VIRGINIA M. TRAHER,
Petitioners

v.

DE HAVILLAND AIRCRAFT OF CANADA, LTD.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the District Court is not reported but appears as Appendix A to the petition for certiorari (pp. 1a-2a). The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 294 F.2d 229 and appears as Appendix B to the petition for certiorari (pp. 3a-4a).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 29, 1961 (Pet. App. 5a). Petitioners' petition for rehearing *en banc*, timely filed, was unanimously denied by order dated August 23, 1961 (Pet. App. 6a). The petition for certiorari was filed on November 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that respondent's minimal contacts with the local life of the District of Columbia disclosed by this record were insufficient to constitute doing business according to District of Columbia law so as to render respondent immune from service of process pursuant to D.C. Code § 13-103 (1951).

STATEMENT

This action for damages for personal injuries allegedly received in a plane crash in the State of Montana and for loss of consortium was instituted in the United States District Court for the District of Columbia on June 2, 1960 (J.A. 1).[1] Petitioners, plaintiffs below, are residents of Minnesota, the defendant is a corporation organized and existing under the laws of Canada, and the plane crash occurred near Malta, Montana on June 5, 1957 (J.A. 1-2). The pertinent allegations of the complaint are that on June 5, 1957 the male petitioner, an employee of the Immigration

[1] J.A. references are to the Joint Appendix prepared for the Court of Appeals and filed as the record in this Court pursuant to Rule 21 (4).

and Naturalization Service, was a passenger in an airplane owned by the United States which crashed on landing near Malta, Montana (J.A. 1-2). It is alleged that the plane was manufactured by the respondent and sold by it to the United States (J.A. 1-2), and that the respondent's negligence in the design, assembly, and manufacture of the plane caused the crash (J.A. 2). The doctrine of res ipsa loquitur is also invoked (J.A. 3). As an additional ground of liability, the complaint alleges the breach of an implied warranty running to the United States (J.A. 3).[2] Since the male petitioner was in the course of his employment with the United States Government at the time of the accident, he has received compensation benefits from the United States pursuant to the provisions of the Federal Employees Compensation Act (5 U.S.C. § 751 et seq.) (J.A. 18).

Thereafter, respondent moved to quash the return of service on the ground that it was not "doing business" in the District of Columbia so as to render it amenable to service of process there (J.A. 4). In support of the motion two affidavits were filed—one by Joseph E. McDonald, Jr., McLean, Virginia, respondent's sole employee in the District of Columbia, and the other by George Joseph Mickleborough, Ontario, Canada, the secretary-treasurer and a director of the respondent (J.A. 5, 6). These affidavits disclose that respondent has but one employee in the District of Columbia, viz. Joseph E. McDonald, Jr., (J.A. 5, 8). He is provided with part-time secretarial service, a desk, a

[2] Respondent did not challenge the legal sufficiency of these allegations but relied instead on the ground that it was not doing business in the jurisdictional sense according to the local law of the District of Columbia.

chair, and telephone answering service in the District of Columbia through an arrangement with Aero Insurance Agency, which began in 1957, after the accident which gives rise to this litigation had occurred (J.A. 5, 8). Respondent maintains all company books and records in Ontario, Canada, where all directors' and stockholders' meetings are held (J.A. 6). No company books or share registers are maintained in the District of Columbia, nor have any stockholders' meetings ever been held here (J.A. 7). Respondent is not now, nor has it ever been, licensed to do business in the District of Columbia (J.A. 7). Moreover, it has never paid any taxes in the District (J.A. 7).

The function of the sole employee in the District of Columbia is to maintain liaison with branches of the Government to obtain information concerning their possible requirements of respondent's products and to forward such information to respondent's main office (J.A. 5, 8). This person does not have the authority to make commitments for respondent, nor does he have the power of decision with respect to the sale of respondent's products. All such inquiries are directed to respondent's main office (J.A. 6, 8). No contracts for the sale of respondent's products are executed in the District of Columbia nor does it maintain any stock or warehouse here (J.A. 6, 8). All sales of respondent's products to the Department of Defense are made to the Canadian Commercial Corporation, an agency of the Canadian Government, which in turn contracts with the Department of Defense (J.A. 9). Delivery under such contracts is made at Downsview, Ontario (J.A. 9). Contracts for the sale of respondent's products to the civilian agencies of the Government are made either by respondent with a

broker in the United States who may then resell to the agency involved or directly by respondent with the Government (J.A. 9).[3] No airplane or spare parts have ever been delivered to any purchaser in the District of Columbia (J.A. 9). Although respondent's name appears in the Washington telephone directory, it does not appear in any trade directory (J.A. 9). Of course, should an inquiry be received from a non-governmental source, the liaison man is expected to reply courteously and refer the caller to respondent's sales and service office (if the call relates to a sale or service) (J.A. 5, 8). That office is not located within the District of Columbia (J.A. 5, 8).

On the basis of the foregoing facts respondent moved in the District Court to quash the return of service upon it on the ground that it was not "doing business" in the District of Columbia within the meaning of D.C. Code § 13-103 (1951), as that statute had been construed by the United States Court of Appeals for the District of Columbia Circuit (J.A. 4). The District Court granted the motion to dismiss on the ground that respondent's activities "are confined to solicitation of business and to answering inquiries as well as gathering information" and that the activities described were "not sufficient activities to constitute the doing of business in the District of Columbia . . ." (J.A. 27).

The Court of Appeals affirmed *per curiam*, without dissent (Pet. App. 3a). After reviewing the facts with respect to the contacts of respondent with the local

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[3] There is nothing in the record to indicate how this particular plane was transferred from respondent to the United States Government.

business life of the District of Columbia the Court remarked of this Montana plane crash that "the present suit has no connection with the District of Columbia or appellee's [respondent's] activities here, such as they are" (Pet. App. 4a). Relying also on its decision in *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142 (1945), the Court noted that in *Mueller*

> the governmental contacts of the defendant were insufficient to provide a basis for service in a suit brought by a plaintiff not involved in those contacts. The same is true in the instant case, which is strikingly similar in its facts. (Pet. App. 4a).

The judgment of the Court of Appeals was entered on June 29, 1961 (Pet. App. 5a). Thereafter, a petition for rehearing, *en banc*, was filed by petitioner. On August 23, 1961 with all nine judges of the Court of Appeals participating, the petition for rehearing was denied, *per curiam*, again with no dissent (Pet. App. 6a).

ARGUMENT

1. The Court of Appeals has correctly interpreted a statute of local applicability. This Court, of course, "will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited [confined in operation to the District] or which declare the common law of the District." *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935). See also *Griffin* v. *United States*, 336 U.S. 704, 712-718 (1949); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944). Since this case arises under an interpretation of the District of Columbia Code there is no "federal standard" applicable to it. But even if there were, it does

not follow that such a standard must be applied to the District of Columbia. As this Court said in *Griffin* v. *United States, supra,* 336 U.S. at 712:

> But even assuming that the "federal rule" is that the evidence described in the motion for a new trial would be admissible, it does not follow that it must also be the rule for the District of Columbia. This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.

The Court of Appeals has acted correctly in a case peculiarly within its own jurisdiction, and its interpretation of a local statute should not be reviewed by this Court.

2. Petitioners state that this case presents a "fundamental constitutional issue" (Pet. 8) and an "important constitutional question" (Pet. 11) since, as they view it, the "guarantees of the Fifth and Fourteenth Amendments protect [their] cause of action" (Pet. 12). Since the provisions of the Fourteenth Amendment apply only to a "State" as distinguished from the District of Columbia, we pass without comment this phase of petitioners' argument. With respect to petitioners' suggestion that due process requires the District of Columbia courts to hear their case, they are met at the outset with the fact that the point is not seasonably raised. Petitioners' suggestion that due process required the lower court to deny the motion to quash was made for the first time in their Petition for Certiorari addressed to this Court. It thus comes too late.

3. Petitioners argue that due process *compels* the District of Columbia to open its courts to petitioners'

cause of action because of respondent's contacts within the District. In so arguing, petitioners rely upon three of this Court's opinions, two of which dealt only with the question whether due process *prohibited* a state from opening its courts to a cause of action because the party served had so few contacts with that state,[4] and the third of which supports respondent's position rather than petitioners'.

Thus, in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), International Shoe claimed that its activities within the State of Washington were not sufficient to "manifest its presence" there, and thus it was denied due process by being subjected to suit in that state. This Court *held* that International Shoe's activities were so "systematic and continuous throughout the years" in the State of Washington that it was not denied due process by being subjected to suit there. *Id.* at 320. There was no indication whatever in the opinion that the State of Washington was compelled by the Due Process Clause to entertain the suit.[5]

Similarly, in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), the California court, applying a California statute that subjected foreign corporations to suit in California on insurance contracts with residents of that state, entered judgment against Inter-

[4] The significance of the difference between prohibiting and compelling the entertainment of a cause of action was recognized by this Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-448 (1952).

[5] Even if there had been such an indication, the decision would not be applicable here. International Shoe employed systematic and widespread solicitation by eleven to thirteen salesmen in the State of Washington. Such contacts were, of course, missing here.

national Life. A Texas court refused to enforce the judgment. This Court *held* that since the insurance contract had a substantial connection with California, due process "did not preclude the California court from entering a judgment binding on" International Life (*id.* at 223), and consequently Texas was required to give full faith and credit to the California judgment. Again, there was no ruling, implied or otherwise, that California was required to entertain the suit.[6]

The third case from this Court relied upon by petitioners is *Hanson* v. *Denckla*, 357 U.S. 235 (1958). Far from militating against the decision in this case, the decision there actually supports it. This Court *held* that the contacts which the Wilmington Trust Company had with the State of Florida were insufficient to render it subject to service of process emanating from the Florida courts. This Court noted in part that "the cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State" (*id.* at 251) a comment equally applicable to the facts in the present case.

Thus, the asserted violation by the Court of Appeals of principles announced by this Court is non-existent. The decision in this case rests on the doctrine of *Mueller Brass*, decided in 1945 after this Court's decision in *International Shoe*, and applies a construction of the D.C. Code which has been settled for more than fifteen years.

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[6] Again, even if there had been such a ruling, it would not be applicable here. The insurance contract in the *McGee* case was delivered in California, the premiums were mailed from California, and the insured was a resident of California when he died. 355 U.S. at 223.

4. Finally, petitioners assert that the decision of the Court of Appeals is in "substantial conflict" with decisions of other Courts of Appeal (Pet. 8). The alleged conflict is illusory.

The Court of Appeals in this case decided no more than that the contacts which respondent has with the local life of the District of Columbia are so minimal that respondent could not be said to be "doing business" in the District as that term is used in the D.C. Code. The Court was interpreting a local statute, and its decision was supported by its prior ruling in *Mueller Brass* construing the same statute. *Mueller Brass* has become a well accepted part of the local law of the District of Columbia in the more than fifteen years since it was decided.[7]

The decisions of the circuit courts which petitioners claim are in conflict with the instant case were all rendered in diversity of citizenship cases, and two of them were interpreting the local law of other jurisdictions. Thus, in *Florio* v. *Powder Power Tool Corp.*, 248 F. 2d 367 (3d Cir. 1957), the court tested corporate presence by reference to a local Pennsylvania statute, and the opinion was entirely directed to the proper application of Pennsylvania law under Pennsylvania standards. Similarly, in *Westcott-Alexander, Inc.* v. *Dailey*, 264 F. 2d 853 (4th Cir. 1959), the court was concerned only with a Virginia statute and Virginia decisions to measure the acts of the defendant and decide whether or not the corporation was present for jurisdictional purposes.

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[7] See, *e.g.*, *Weisblatt* v. *United Aircraft Corp.*, 134 A. 2d 713 (Mun. App. D.C. 1957), and *Rulstrand* v. *Kaman Aircraft Corp.*, D.D.C. Civil Action No. 259-58, in which *Mueller* was followed in cases similar to the instant case.

The opinion of the Court of Appeals in this case is no more in conflict with the *Florio* and *Westcott-Alexander* opinions than those cases are in conflict with each other. "As to questions controlled by state law . . . conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

In the third case, *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508 (2d Cir. 1960), the court *held* that where a New York Corporation for more than six years took orders and processed them for a North Carolina corporation; received and acted upon, by investigation, response, and otherwise, all complaints, and provided the money at once for its principal by factorizing the contracts through its own subsidiary, the North Carolina corporation could be served in New York, especially since the claim against it arose out of these very activities conducted by the New York corporation. *Id.* at 511. The court stated in *dicta* that in diversity cases a federal rule is applicable to service of process, but the court *held* that the New Jersey corporation's contacts were such that it was subject to service regardless of which rule was applied. *Id.* at 510. Petitioners have cited no case in which a so-called federal rule, even if applicable under the local District of Columbia Code provision, would dictate proper service under the facts of the instant case, where respondent's contacts with the local life of the District of Columbia were minimal and where the cause of action arose out of facts having no particular relation to the District of Columbia.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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